STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 9, 2005
v	No. 253336 Wayne Circuit Court
JOSEPH HARLOW BARTON, Defendant-Appellant.	LC No. 03-010811-01

Before: Whitbeck, C.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

A jury convicted defendant Joseph Barton of resisting and obstructing a police officer,[1] and the trial court sentenced him to two years' probation. Barton appeals as of right. We affirm. We decide this case without oral argument under MCR 7.214(E).

I. Basic Facts And Procedural History

On the morning of September 2, 2003, officers Terry Priest and David Fobar were dispatched to a residence in Southgate for a reported home invasion. Priest went into the home after knocking and announcing his presence, and Fobar followed. While looking around the rooms downstairs, Priest and Fobar heard someone coming downstairs. Barton and his wife, Faith Pierce, met the officers at the door to the stairway.

The officers asked Barton and Pierce for identification and Pierce showed the officers pictures of the couple's wedding, along with other photographs. Barton asked the officers to leave his home. Barton told the officers that his identification was upstairs, and they asked him to get it. Barton went upstairs and Pierce attempted to follow him, but Fobar physically removed her from the stairs and put her in the living room while Priest followed Barton upstairs.

Priest testified that when he got to the top of the stairs, Barton leveled a handgun at him and told him to get out of his house. Priest then pulled his own gun and ordered Barton to drop the gun. Priest testified that he gave the order at least two times. Fobar heard the order from downstairs. Barton dropped the gun and stepped into the bathroom doorway, then came out and

[1] MCL 750.479.

handed his wallet to Priest. Priest ordered Barton to put his hands up and ordered him to the ground. Barton did neither. Priest tripped Barton and hit him on the leg with his baton. Fobar went upstairs with his gun drawn. According to the officers, there was a struggle to get Barton handcuffed.

Barton testified that he did not point a gun at the officer, but had the holstered gun in his left hand in order to put it out of sight beneath the cushions of the sofa. He explained that he backed into the bathroom door to avoid being shot. He also testified that he did not know he was under arrest and was trying to protect himself from the officer's baton by assuming the fetal position.

During deliberations, the jury asked to have the felonious assault and felony-firearm charges explained. The jury also asked to hear Priest's testimony again, and specifically asked when the officer told Barton he was under arrest. The trial court instructed the jurors to use their collective memory. The jury convicted Barton of resisting and obstructing a police officer, but acquitted him of felonious assault[2] and possession of a firearm while committing a felony.[3]

II. Ineffective Assistance Of Counsel

A. Standard Of Review

When evaluating an ineffective assistance of counsel claim, which is a mixed question of law and fact, we review the findings of the trial court for clear error and review de novo whether those facts constitute a violation of a defendant's constitutional right to the effective assistance of counsel.[4] Because there was no evidentiary hearing, our review is limited to the existing record.[5]

B. Resisting And Obstructing

Barton argues that counsel was ineffective for failing to adequately present the facts surrounding his arrest to the jury. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[6] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[7] To show an objectively unreasonable performance, the defendant must prove that counsel made "errors so serious that counsel was not

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[2] MCL 750.82.

[3] MCL 750.227b.

[4] See *People v Riley*, 468 Mich 135, 139; 659 NW2d 611 (2003); *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

[5] *People v Snider*, 239 Mich App 393, 423; 698 NW2d 502 (2000).

[6] *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994).

[7] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[8] In so doing, the defendant must overcome a strong presumption that the challenged conduct might be considered sound trial strategy.[9] The defendant must also show that the proceedings were "fundamentally unfair or unreliable."[10]

Barton contends that counsel's closing argument was so deficient as to deny him the right to counsel, because counsel only briefly raised the argument that Barton was not aware that he was under arrest due to the fact that the officer had struck him hard on the head. In support of this claim, Barton relies on *People v Carrick*,[11] in which counsel entirely failed to raise an applicable defense.[12] However, *Carrick* is not analogous, because counsel did raise and argue the defense that Barton was unaware he was under arrest. Counsel reviewed the circumstances surrounding the arrest in his closing argument, and also referred to Barton's arrest and the circumstances surrounding it in his opening statement. Counsel cross-examined the arresting officer about his actions during the encounter and during the actual arrest. Additionally, Barton himself testified about the facts and circumstances, stating twice that he did not know he was under arrest, and that he did not resist.

Further, Barton has not carried his burden to prove that, but for the claimed error, there is a reasonable probability that a different result would have been reached at trial. The trial court instructed the jury that the prosecutor's duty was to prove all the elements of the crime beyond a reasonable doubt. The trial court stated:

> First, that Mr. Barton resisted an officer of the law who was making an arrest. The defendant must have actually resisted by what he did or said, but physical violence is not necessary. Second, that the person that the defendant resisted was a police officer. Third, that the defendant, Mr. Barton, knew that the person that he was resisting was a police officer. Fourth, that the defendant knew that the officer was making an arrest. And, finally, ladies and gentlemen, sixth, that the arrest that the defendant resisted was a legal arrest, a legal arrest, okay?

After receiving these instructions, the jury asked questions about the arrest, along with the two charges on which it acquitted Barton. The jury deliberated almost four hours for a trial that took less than a day, and ultimately found Barton not guilty on the two most serious charges.

In sum, Barton has not shown that counsel's performance at trial was deficient.[13] While a "single, serious error" may support a claim of ineffective assistance of counsel,[14] such is not the

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[8] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

[9] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[10] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[11] *People v Carrick*, 220 Mich App 17; 558 NW2d 242 (1996).

[12] See *id*. at 22.

[13] *Pickens*, *supra* at 314.

[14] *Kimmelman v Morrison*, 477 US 365, 383-384; 106 S Ct 2574; 91 L Ed 2d 305 (1986); *People v Reed*, 449 Mich 375, 391; 535 NW2d 496 (1995).

case here. There is a "wide range of reasonable professional assistance . . .,"[15] and we find that counsel's performance fit within that wide range. Specifically, we are convinced that Barton received "the assistance necessary to justify reliance on the outcome of the proceeding."[16] Even if counsel's conduct had been deficient, having reviewed the record, we find no indication that Barton's right to a fair trial was prejudiced or that there is a reasonable probability of a different result.[17]

Affirmed.

/s/ William C. Whitbeck
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald

[15] *Strickland*, *supra* at 689.

[16] *Id*. at 691-692.

[17] *Toma*, *supra*.